United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL
with proof of service

74-1751

United States Court of Appeals

For the Second Circuit.

B Pls

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI,

Plaintiff-Appellant,

-against-

HARTFORD INSURANCE COMPANY,

Defendant-Appellee.

On Appeal From The District Court Of The United States For The Eastern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOHN L. PIAZZA
350 Fifth Avenue, Suite 6101
New York, N.Y. 10001
Attorney for Plaintiff-Appellant

3

74-1751

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 74-1751

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI,

Plaintiff-Appellant,

--against--

HARTFORD INSURANCE COMPANY,

Defendant-Appellee.

On Appeal From the District Court of the United States For the
Eastern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

John L. Piazza
350 Fifth Avenue, Suite 6101
New York, New York 10001
Attorney for Plaintiff-Appellant

INDEX

74-1751

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 74-1751

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI,

Plaintiff-Appellant,

--against--

HARTFORD INSURANCE COMPANY

Defendant-Appellee.

On Appeal From the District Court of the United States For the Eastern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

Statement

In our principal brief on this appeal, we urged that a Notice of Cancellation of an insurance policy must be clear, unequivocal and non-contingent; that the purported third Notice of Cancellation by the Benway Agency is legally insufficient in that

the Notice was directed to a corporate officer and not to the insured; that the Notice of Cancellation upon which the appellee relies, the second Notice of Cancellation, has yet to become effective because its effective date is thirty-five (35) days after receipt and not after mailing; and that by virtue of the inconsistent positions adopted by the insurer, the insurer is equitably estopped from claiming that the policy was cancelled. We think these points were adequately demonstrated in our main brief, and will not burden the Court with further discussion of them. We make only these brief responses to the appellee's answering brief:

POINT I

HARTFORD'S EFFORTS TO COLLECT PREMIUMS FOR PERIODS SUBSEQUENT TO ITS ALLEGED CANCELLATION DATE OPERATE AS A BAR TO ITS CLAIM THAT THE POLICY TERMINATED ON A DATE CERTAIN.

In our principal brief, we discussed that Hartford continued to accept and to bill for unearned premiums. Hartford billed Narrows on September 28th, 1971 for the balance of the first year (during which the loss occurred) and their bill is shown in the Exhibit Book at page 17. Then on October 12th, 1971, Hartford threatened to turn the claim over to a collection agency if the premium was not paid immediately (Exhibit Book at page 19). At page fourteen (14), last paragraph, of the Appellee's Brief, the appellee states, and we quote:

"Benway further testified, in response to Judge Bartels' inquiries, that he billed DeFranco on June 1, 1971 for the second year installment but he never received 'a check, phone calls or reply whatsoever'."

Accordingly, Benway, as agent for Hartford, billed Narrows for the second year's premiums (221a) even though Hartford claims that it terminated the policy within the first year!

Formal Notice of Cancellation of a contract may be utterly counteracted and overborne by subsequent recognition of it as an existing obligation. A party cannot by words cancel this contract and then continue to assert rights and benefits under it (Gravenhorst v. Zimmerman, 236 N.Y. 22; Brennan v. National Equitable Ind. Co., 224 N.Y.S. 572).

POINT II

APPELLEE'S ASSERTION THAT CHEMICAL BANK NOTIFIED NARROWS THAT A PAYMENT IS PAST DUE IS CLEARLY ERRONEOUS.

At page 3, second to last paragraph of the Appellee's Brief, the appellee states:

> "With respect to the ninth payment, due April 25, 1971, plaintiff was notified in writing by the Chemical Bank that 'According to our records, the amount shown below (i.e. 254.34) is now past due.' A copy of said notice was sent to defendant (81a-87a; Deft's Exh. F, p. 21, E.B.)."

A close examination of the Defendant's Exhibit F appearing at page 21 of the Exhibit Book reveals that the notice, mailed in a window envelope, was addressed:

> Narrows Promotions Inc.
> 2100 Richmond Rd.
> N.Y.

No city and no zip code were indicated; and no representative of Chemical Bank testified that the envelope was not returned. The presumption, therefore, is that the notice never reached the plaintiff in Staten Island. Fact is, there was no evidence introduced that this premimum was not paid since no representative of Chemical Bank testified.

POINT III

APPELLEE ELOQUENTLY EXPLAINED ITS OWN DEFICIENCY IN THE PROOF OF MAILING OF THE PURPORTED SECOND NOTICE: THE ASSEMBLER, THE KEY LINK IN THE CHAIN OF CUSTODY OF THE PURPORTED SECOND NOTICE, NEVER TESTIFIED.

With the first Notice of Termination of the insurance policy being utterly valueless in that it was unclear, equivocal and contingent (see Point I of Appellant's main brief), the chain of custody of the purported second Notice, used to establish Hartford's proof of mailing and hence its proof of termination of coverage, is of increasing importance.

With regard to this purported Second Notice of Cancellation, at page 20, last paragraph, of the Appellee's Brief, the appellee states:

> "When the typing job was finished, Mrs. Vierno handed the typed set to the assembler who first checked the pertinent data and then distributed the notices to the insured, named mortgagee, producer or broker, and the balance to file. The assembler folded the insured's copy and put it into a right-hand window envelope with the name of the insured and address 'showing out' and a copy of the postal receipt, entitled 'certificate of mailing', clipped to the envelope. The same procedure was followed with respect to the named mortgagee except, of course, the latter's copy was placed in a left-hand window envelope." (emphasis supplied)

Obviously, this assembler was a vital link in the chain of custody. He checked the pertinent data on the Notices and put

them into the correct envelopes. . . for a review of the Notice (Exhibit Book at page 35) would demonstrate that a left-hand window envelope would not permit the insured's name and address to show through the window and a right-hand window envelope would not permit the named mortgagee's name and address to show through the window. When we consider that the named mortgagee never received his notice (Appendix at page 167a), we realize the strong possibility of error.

Yet this assembler never testified and hence, Hartford fell short of the requisite proof of the mailing of the purported second Notice of Cancellation.

CONCLUSION

Hartford fell short of the required proof of cancellation of the policy and is equitably estopped to claim that the policy was in fact cancelled.

Accordingly, the decision and judgment of the lower Court must be reversed as a matter of law and judgment must be entered in favor of the plaintiff-appellant for the relief demanded in the complaint.

Respectfully submitted,

JOHN L. PIAZZA
Attorney for the Appellant

New York, New York
September 28th, 1974.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
CITY OF NEW YORK : ss.:
COUNTY OF NEW YORK)

A. JUNE VICKERS, being duly sworn, according to law, deposes and says:

1. Deponent is not a party to the within action, is over twenty-one (21) years of age, and resides in the city, county, and state of New York.

2. On October 30th, 1974, deponent served the within Appellant's Reply Brief Upon Appeal upon Messrs. Greenhill and Speyer, attorneys for the Appellee in this action, at 56 Pine Street, New York, New York, 10005, the address designated by said attorneys for that purpose, by depositing two true copies of same in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service, within the city, county and state of New York.

A. June Vickers

A. JUNE VICKERS

Sworn to before me this
30th day of October, 1974.

HERMAN A. STUHL
Notary Public, State of New York
No. 31-2950450
Qualified in New York County
Commission Expires March 30, 1976